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IN THE OFFICE OF THE CLERK
Supreme Court of the United States

RICHARD C. WURZINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court should resolve the deep and longstanding circuit split over the effect of a plea agreement on the proper scope of review of the government's discretionary refusal to file a motion to reduce a defendant's sentence in consideration of the defendant's substantial assistance.

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PETITION FOR A WRIT OF CERTIORARI

Richard C. Wurzinger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is unreported but available at 2009 WL 32712. The opinion of the district court (App. B) is unreported.

JURISDICTION

The court of appeals entered its judgment on January 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the Constitution of the United States provides: "No person shall be . . . deprived of life, liberty, or property, without due process of law." The relevant statutory provisions are found in 18 U.S.C. § 3553(e), Fed. R. Crim. P. 35, and United States Sentencing Commission, *Guidelines Manual*, (USSG) § 5K1.1, and are reproduced in the appendix to this petition. App. C at 11a-21a.

STATEMENT OF THE CASE

A. Wurzinger's Conviction And Direct Appeal

Pursuant to a written plea agreement prepared by the Office of the United States Attorney for the Western District of Wisconsin, Wurzinger pleaded guilty to one count of conspiring to manufacture a controlled substance in violation of 21 U.S.C. § 841(a)(1). Wurzinger, age fifty-eight at the time, was sentenced to 262 months in prison, the longest sentence within the range indicated by the Sentencing Guidelines.

Wurzinger appealed his sentence, challenging the sentencing procedure followed by the district court and the reasonableness of his 262-month sentence. The United States Court of Appeals for the Seventh Circuit affirmed, and this Court denied certiorari. *United States v. Wurzinger*, 467 F.3d 649, 651 (7th Cir. 2006), *cert denied*, No. 06-9706, 127 S. Ct. 3066 (June 29, 2007).

B. The Terms Of Wurzinger's Plea Agreement

Pursuant to the plea agreement (App. D at 22a-28a), Wurzinger agreed to make a complete and truthful statement regarding both his involvement in criminal conduct and the involvement of all other individuals known to him:

4. The defendant agrees to make a full, complete and truthful statement regarding his involvement in criminal conduct, as well as the involvement of all other individuals known to the defendant. The defendant agrees to testify fully and truthfully at any trials or hearings. The defendant understands that this plea agreement is not conditioned upon the outcome

of any trial. This agreement is, however, contingent upon complete and truthful testimony in response to questions asked by the Court, the prosecutor or lawyers for any party.

App. 23a-24a.

The plea agreement also provided that if Wurzinger provided substantial assistance before or after sentencing, the government would request that the district court impose a sentence, or reduce an already imposed sentence, pursuant to 18 U.S.C. § 3553(e) or Fed. R. Crim. P. 35, but that the decision whether to file a substantial assistance motion was entirely within the government's discretion:

5. If the defendant provides substantial assistance before sentencing, the United States agrees to move the Court pursuant to 18 U.S.C. § 3553(e) to impose a sentence reflecting that assistance. If the defendant provides substantial assistance after sentencing, the United States agrees to move the Court pursuant to Federal Rule of Criminal Procedure 35 and 18 U.S.C. § 3553(e) to reduce the defendant's sentence to reflect that assistance. The decision whether to make such a request based upon substantial assistance rests entirely within the discretion of the United States Attorneys Office for the Western District of Wisconsin. The defendant acknowledges that even if the United States makes such a request, the Court is not required to reduce the defendant's sentence.

App. 24a.

Wurzinger performed all of his obligations under the terms of the plea agreement, including providing substantial assistance to the government and making complete and truthful statements regarding his involvement in criminal conduct and the involvement of all other individuals known to him. However, the government did not file a substantial assistance motion, before or after sentencing.

C. Wurzinger's Motion To Compel Compliance With The Plea Agreement, Recharacterized By The District Court As A Motion Under 28 U.S.C. § 2255

On August 20, 2007, Wurzinger filed, *pro se*, what he styled as a "Motion to Compel Compliance with the Plea Agreement" pursuant to Fed. R. Crim. P. 35. Wurzinger argued that plea agreements should be treated as contracts and that the government breached the plea agreement when it failed to file a substantial assistance motion on his behalf. The district court recharacterized this motion as a motion to vacate Wurzinger's sentence under 28 U.S.C. § 2255 (hereinafter, the "Section 2255 motion").

The government opposed Wurzinger's Section 2255 motion on the merits, arguing that it was not required to file a substantial assistance motion because the plea agreement gave it discretion whether to do so. The government did not dispute that Wurzinger provided substantial assistance; nor did it dispute that Wurzinger had fully complied with all of his obligations under the plea agreement. The government did not provide any justification for not filing a substantial assistance motion.

Based on Seventh Circuit precedent, the district court summarily ruled that the government did not breach the plea agreement because it retained discretion whether to make a substantial assistance motion:

By not moving to reduce petitioner's sentence the government did not breach the plea agreement because the decision whether to make the motion was within the discretion of the United States Attorney's Office Accordingly, the government did not breach the plea agreement. *See United States v. Artley*, 489 F.3d 813, 824-25 (7th Cir. 2007).

App. 10a.

D. Wurzinger's Appeal Of The District Court's Denial Of His Section 2255 Motion

Wurzinger timely filed a Motion for Certificate of Appealability, which the district court summarily denied one day later. On Wurzinger's appeal of that denial, the Seventh Circuit appointed counsel under the Criminal Justice Act and ordered briefing on three questions: "whether the district court properly construed the action as arising under § 2255; whether Wurzinger needs a certificate of appealability to proceed; and, if so, whether he has made a substantial showing of the denial of a constitutional right."

The pertinent issue here is whether Wurzinger made a substantial showing of the denial of a constitutional

right.¹ Wurzinger argued in his briefs to the Seventh Circuit that the government's failure to file a substantial assistance motion breached the plea agreement or rendered it illusory—either of which denied Wurzinger his constitutional due process rights. He argued that the government's exercise of its discretion not to file a substantial assistance motion breached the agreement by violating the duty of good faith inherent in any contract. Wurzinger urged the Seventh Circuit to depart from its precedent and adopt the approach taken by other circuits under which the government's discretionary refusal to file a substantial assistance motion is reviewable not just for unconstitutional motive, but also for breach of the duty of good faith under ordinary principles of contract law.

The government's response brief relied on Seventh Circuit precedent for the proposition that its exercise of discretion not to file a substantial assistance motion is reviewable only for unconstitutional motive.

The Seventh Circuit, citing its precedent, summarily dismissed Wurzinger's appeal on the ground that the

¹ A "substantial showing of a denial of a constitutional right" is a requirement for a certificate of appealability from a denial of a motion under § 2255. 28 U.S.C. § 2253(c)(2). The requirements of due process apply to a defendant's interest in the enforcement of a plea agreement, and the government's breach of a plea agreement violates the defendant's constitutional due process rights. *Santobello v. New York*, 404 U.S. 257, 262-63 (1971); see also, e.g., *United States v. Lezine*, 166 F.3d 895, 901 (7th Cir. 1999); *United States v. Harvey*, 869 F.2d 1439, 1443-44 (11th Cir. 1989) (en banc).

government's discretion whether to file a substantial assistance motion is reviewable only for unconstitutional motive.² App. 5a.

REASONS FOR GRANTING THE PETITION

A. There Is A Pervasive And Longstanding Circuit Split Over The Effect Of A Plea Agreement On The Proper Scope Of Review Of The Government's Discretionary Refusal To File A Substantial Assistance Motion.

The federal courts of appeals are in longstanding and entrenched conflict over the proper scope of review of the government's exercise of discretion under a plea agreement not to file a motion to reduce a defendant's sentence in consideration of the defendant's substantial assistance.

Five circuits hold that, although the government may retain sole or complete discretion whether to file a substantial assistance motion pursuant to a plea agreement, the contractual nature of a plea agreement

² In neither the district court nor the Seventh Circuit did the government argue Wurzinger had waived the issue of whether the government breached the plea agreement by failing to file a substantial assistance motion, or that the plain error standard somehow applied. Both the district court and the Seventh Circuit addressed Wurzinger's argument on the merits, summarily denying relief based on Seventh Circuit precedent.

imposes a duty of good faith on the government in exercising that discretion:

D.C. Circuit: *United States v. Jones*, 58 F.3d 688, 692 (D.C. Cir. 1995).³

First Circuit: *United States v. Alegria*, 192 F.3d 179, 187 (1st Cir. 1999).⁴

Second Circuit: *United States v. Rexach*, 896 F.2d 710, 714 (2d Cir. 1990).⁵

Third Circuit: *United States v. Isaac*, 141 F.3d 477 (3d Cir. 1998).⁶

³ See also, e.g., *In re Sealed Case*, 244 F.3d 961, 964-66 (D.C. Cir. 2001); *In re Sealed Case No. 97-3112*, 181 F.3d 128, 142 (D.C. Cir. 1999) (en banc).

⁴ See also, e.g., *United States v. Nelson-Rodriguez*, 319 F.3d 12, 52 (1st Cir. 2003); *United States v. Davis*, 247 F.3d 322, 325-28 (1st Cir. 2001); *United States v. Doe*, 233 F.3d 642, 644 (1st Cir. 2000).

⁵ See also, e.g., *United States v. Roe*, 445 F.3d 202, 210 (2d Cir. 2006); *United States v. Leonard*, 50 F.3d 1152, 1157 (2d Cir. 1995); *United States v. Knights*, 968 F.2d 1483, 1487 (2d Cir. 1992).

⁶ See also, e.g., *United States v. Adjei*, 2009 WL 405680, *4 (3d Cir. Feb. 19, 2009); *United States v. Drennon*, 516 F.3d 160, 162 n.1 (3d Cir. 2008); *United States v. Floyd*, 428 F.3d 513, 515-18 (3d Cir. 2005); *United States v. Almodovar*, 42 Fed. App'x 540 (3d Cir. 2002); *United States v. Abuhouran*, 161 F.3d 206, 212 (3d Cir. 1998); *United States v. Carrara*, 49 F.3d 105, 107 (3d Cir. 1995).

Ninth Circuit: *United States v. Quach*, 302 F.3d 1096, 1103 (9th Cir. 2002).⁷

Conversely, under the law of five other circuits, including the Seventh Circuit, the government's discretionary refusal to file a substantial assistance motion pursuant to a plea agreement is reviewable only for unconstitutional motive:

Fourth Circuit: *United States v. Wallace*, 22 F.3d 84, 87 (4th Cir. 1994).⁸

Fifth Circuit: *United States v. Bonilla*, 11 F.3d 45, 47 (5th Cir. 1993).⁹

Seventh Circuit: *United States v. Burrell*, 963 F.2d 976, 984 (7th Cir. 1992).¹⁰

⁷ See also, e.g., *United States v. Flores*, __ F.3d __, 2009 WL 692002, *2 (9th Cir. Mar. 18, 2009); *United States v. Awad*, 371 F.3d 583, 585-86 (9th Cir. 2004); *United States v. Fox*, 8 Fed. App'x 800, 803 n.1 (9th Cir. 2001); *United States v. De la Fuente*, 8 F.3d 1333, 1340 (9th Cir. 1993).

⁸ See also, e.g., *United States v. Huskins*, 2009 WL 729018, *1 (4th Cir. Mar. 20, 2009); *United States v. Surgis*, 230 Fed. App'x 336, 338 (4th Cir. 2007); *United States v. Rush*, 98 Fed. App'x 942, 943 (4th Cir. 2004); *United States v. Mull*, 45 Fed. App'x 284, 284-85 (4th Cir. 2002).

⁹ See also, e.g., *United States v. Phillips*, 141 Fed. App'x 248, 250 (5th Cir. 2005); *United States v. Aderholt*, 87 F.3d 740, 742 (5th Cir. 1996).

¹⁰ See also, e.g., *United States v. Artley*, 489 F.3d 813, 825 (7th Cir. 2007); *United States v. Magee*, 26 Fed. App'x 577, 579 (7th Cir. 2001).

Eighth Circuit: *United States v. Romsey*, 975 F.2d 556, 558 (8th Cir. 1992).¹¹

Eleventh Circuit: *United States v. Forney*, 9 F.3d 1492 (11th Cir. 1993).¹²

Decisions on this issue in the Tenth Circuit are in conflict. Some Tenth Circuit decisions hold that the district court may review whether the government's decision not to file a substantial assistance motion pursuant to a plea agreement is based on good faith. *E.g.*, *United States v. Vargas*, 925 F.2d 1260, 1266 (10th Cir. 1991).¹³ Other Tenth Circuit decisions hold that the government's discretionary refusal to file a substantial assistance motion pursuant to a plea agreement is reviewable only for unconstitutional motive. *E.g.*, *United States v. Hawley*, 93 F.3d 682, 691 (10th Cir. 1996).¹⁴

¹¹ See also, *e.g.*, *United States v. Kelly*, 18 F.3d 612, 617-18 (8th Cir. 1994); *United States v. Lewis*, 3 F.3d 252, 255 (8th Cir. 1993).

¹² See also, *e.g.*, *United States v. Perez-Morales*, 2009 WL 865156, *2 (11th Cir. Apr. 2, 2009); *United States v. Mignott*, 278 Fed. App'x 997, 999-1000 (11th Cir. 2008); *United States v. Anderson*, 216 Fed. App'x 886, 889 (11th Cir. 2007); *United States v. Ortiz*, 133 Fed. App'x 655, 656-57 (11th Cir. 2005).

¹³ See also, *e.g.*, *United States v. Cerrato-Reyes*, 176 F.3d 1253, 1264 (10th Cir. 1999); *United States v. Crocklin*, 1999 WL 41074, *1 (10th Cir. Feb. 1, 1999); *United States v. Walton*, 1998 WL 544310, *2 (10th Cir. Aug. 28, 1998); *United States v. Thompson*, 1998 WL 544313, *2 (10th Cir. Aug. 26, 1998); *United States v. Lee*, 989 F.2d 377, 380 (10th Cir. 1993).

¹⁴ See also, *e.g.*, *United States v. Kovac*, 23 Fed. App'x 931 (10th Cir. 2001); *United States v. Berger*, 251 F.3d 894, 910 (10th Cir. 2001); *United States v. Webb*, 2000 WL 1596108, *2 (10th Cir. Oct. 26, 2000).

Finally, the Sixth Circuit has a unique approach on this issue, holding that the district court may review the government's exercise of its discretion under a plea agreement not to file a substantial assistance motion only for unconstitutional motive but requiring the government to prove that it in fact exercised its discretion. "Even when . . . the government retains discretion in deciding whether a defendant provided substantial assistance, the government must exercise that discretion and cannot simply decline to file a § 5K1.1 motion." *United States v. Villareal*, 491 F.3d 605, 610 (6th Cir. 2007).

B. The Good Faith Obligation Enforced By Five Circuits Is Properly Based On Standard Principles Of Contract Law.

As recently confirmed by this Court, "plea bargains are essentially contracts." *Puckett v. United States*, __ S. Ct. __, No. 07-9712, slip op. at 6 (Mar. 25, 2009). The five circuits that require good faith in the government's discretionary refusal to file a substantial assistance motion pursuant to a plea agreement do so based on ordinary principles of contract law.

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts § 205; *see also* 5 S. Williston, Contracts § 670, at 159 (3d ed. 1961). Where a party retains sole discretion in the performance of its obligation under a contract, the exercise of that discretion must be in accordance with this duty of good faith and fair dealing; otherwise, such an agreement would be illusory. Restatement (Second) of Contracts § 228, cmt. a.

Thus, under ordinary principles of contract law, when the government states in a plea agreement that it will file a substantial assistance motion upon the defendant's compliance with the agreement's terms, but it retains sole discretion whether to do so, the government must exercise that discretion in good faith. Reasoning from these contract principles and *Santobello v. New York*, 404 U.S. 257 (1971), the Third Circuit has held that "[a]lthough a plea agreement occurs in a criminal context, it remains contractual in nature and is to be analyzed under contract-law standards," including the duty of good faith. *Isaac*, 141 F.3d at 481 (quoting *United States v. Moscahlaidis*, 868 F.2d 1357, 1361 (3d Cir. 1989)).¹⁵

The review for good faith follows from the principle that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Leonard*, 50 F.3d at

¹⁵ *Santobello* held that when a defendant has entered into a plea agreement a court has broad powers to enforce the terms of the plea contract. 404 U.S. at 261-62. The Court reasoned that "[t]his phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262. Thus, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Id.* The District of Columbia, First, Second, and Ninth Circuits also relied on *Santobello* in reasoning that plea agreements are contractual in nature and, like any contract, come with a duty of good faith. *E.g.*, *Rexach*, 896 F.2d at 713.

1157 (internal quotation marks omitted). "Like all contracts, [a plea agreement] includes an implied obligation of good faith and fair dealing. Thus, while the plea agreement did not guarantee [the defendant] a section 5K1.1 motion, we believe it did guarantee fair dealing." *Jones*, 58 F.3d at 692 (citations omitted). Accordingly, under the "principles of contract and the Constitution," a court may grant a defendant "relief if the defendant's cooperation was provided pursuant to a plea agreement, and the government's refusal to file is attributable to bad faith or other breach of the agreement." *In re Sealed Case No. 97-3112*, 181 F.3d at 142. "Contract law principles apply because, without them, the defendant would be deprived of the benefit of his plea bargain" *Abuhouran*, 161 F.3d at 212. A defendant does not "strike an illusory bargain" but rather has a "reasonable expectation that there would be a discretionary evaluation of his cooperation in good faith." *Isaac*, 141 F.3d at 483.

One circuit has expressed concern that, without an enforceable duty of good faith, prosecutors could engage in deception:

[P]rosecutors might dangle the [boilerplate] suggestion of a section 5K1.1 motion in front of defendants to lure them into plea agreements, all the while knowing that the defendant's cooperation could not possibly constitute assistance valuable enough for the Departure Committee to find it "substantial."

Whereas the Government is a repeat player in this ritual, each defendant approaches the

provisions of his plea agreement anew with the understandable belief that the agreement and its terms are tailored to that defendant's particular circumstance. By indiscriminately implying in each and every case not only that a § 5K1.1 motion is a possibility, but also that partial cooperation might in a given case be sufficient, the agreement is arguably deceptive.

In re Sealed Case, 244 F.3d at 966 (citation omitted).

Another circuit has emphasized that a defendant "could not have reasonably understood the terms of the plea agreement to offer nothing in exchange for his cooperation; neither, we hope, could the government have entertained such an understanding." *De la Fuente*, 8 F.3d at 1340. "We are unwilling to impute to the government the level of cynicism and bad faith implicit in negotiating an agreement under which it persuaded a defendant to help convict his relative by offering what appeared to be a reduced sentence but in fact offered him no benefit. . . . [W]e would decline to acknowledge and reward such conduct in light of the high standard of fair dealing we expect from prosecutors." *Id.*

C. Five Contrary Circuits Erroneously Extend *Wade v. United States*, 504 U.S. 181 (1992), In Holding That The Scope Of Review Of The Government's Exercise Of Discretion Under A Plea Agreement Is Limited To Unconstitutional Motive.

So long as the government's exercise of discretion is not based on an unconstitutional motive, such as race or religion, the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits hold that district courts have no power to review the government's discretionary refusal to file a substantial assistance motion pursuant to a plea agreement. *See, e.g., Wallace*, 22 F.3d at 87; *Aderholt*, 87 F.3d at 742; *Romsey*, 975 F.2d at 558; *Forney*, 9 F.3d at 1499-1501. These courts of appeals predicate this limited review of the government's discretion on Justice Souter's opinion for a unanimous court in *Wade v. United States*, 504 U.S. 181, 185-86 (1992).

Wade did not involve a plea agreement, however. In the absence of a plea agreement, the Court in *Wade* carved a narrow limitation on the government's discretionary refusal to file a substantial assistance motion, requiring that the exercise of such discretion be without unconstitutional motive. 504 U.S. at 185-86. ("It follows that a claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing."). The foregoing circuits have extended *Wade* in holding that in the *presence* of a plea agreement the government's exercise of its discretion

not to file a substantial assistance motion may be reviewed only for unconstitutional motive.¹⁶

This extension of *Wade* to plea agreements makes the government's discretionary promise to file a substantial assistance motion meaningless. As noted in *Wade*, the government independently has discretion to file a substantial assistance motion before or after sentencing under 18 U.S.C. § 3553(e), USSG § 5K1.1, and Fed. R. Crim. P. 35. *Wade* affords the criminal defendant protection against unconstitutional motive when the government refuses to file such a motion. Hence, the circuits which have extended *Wade* to cases involving plea agreements, in substance, hold that substantial assistance provisions in such agreements are superfluous—i.e., those contract provisions add nothing beyond the protection against unconstitutional motive that the defendant already has entirely apart from a plea agreement.

D. This Case Is An Appropriate Vehicle For This Court To Decide The Question Presented.

The Seventh Circuit's decision below is unpublished, and summarily decides the pertinent issue based on circuit precedent. In the circumstances presented, those factors do not make this case inappropriate for this Court's review. On the contrary, this case is a very

¹⁶ Conversely, the circuits which apply standard contract principles to require the government's exercise of discretion under a plea agreement to be in good faith have held that *Wade* is inapplicable because it did not involve a plea agreement. *E.g.*, *Isaac*, 141 F.3d at 481 n.1.

appropriate vehicle for this Court to decide this important and recurring question.

First, the split between the circuits is sharp and irreconcilable. The issue has been decided by every relevant circuit, and has been thoroughly developed and analyzed in a large number of appellate decisions. No further development of the legal issue is necessary or likely to occur.

Second, the circuit split is longstanding, and there is no indication that the sharply conflicting views will be resolved without intervention by this Court. Each circuit has addressed the issue on numerous occasions, and none has changed its mind.¹⁷ Indeed, in this case, Wurzinger explicitly argued that the Seventh Circuit should depart from its precedent and apply the good faith standard based on contract law, as five other circuits hold. The Seventh Circuit summarily rejected this argument, reaffirming its reliance on *Wade*. App. 5a.

Third, because the issue has been so thoroughly ventilated in each circuit, most if not all further decisions are likely to be summary in nature.¹⁸ Thus, this case is

¹⁷ The Tenth Circuit is a partial exception, but only in the sense that it has decided both ways with no authoritative resolution of the intra-circuit split. See Part A, *supra*.

¹⁸ Indeed, in one unpublished decision, another court of appeals suggested that an appeal based on the government's alleged breach of the plea agreement would be "frivolous" because circuit precedent established the government had the discretion not to file a departure motion. *Magee*, 26 Fed. App'x at 579.

typical of those in which the issue is likely to be presented to this Court in the future.

Fourth, the issue is recurring, as shown by the number of decisions in the courts of appeals since *Wade*, including several in the last sixty days.

Finally, it is also pertinent that the government has not sought certiorari in cases in which the criminal defendant was granted relief on this issue. *E.g.*, *Roe*, 445 F.3d 202; *Leonard*, 50 F.3d 1152; *Knights*, 968 F.2d 1483; *Isaac*, 141 F.3d 477; *Floyd*, 428 F.3d 513; *Awad*, 371 F.3d 583; *Almodovar*, 42 Fed. App'x 540.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

TODD VARE
Counsel of Record
KARA MOORCROFT
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, IN 46204
(317) 236-1313

Counsel for Petitioner

APPENDIX

1a

**APPENDIX A — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH
CIRCUIT DECIDED JANUARY 7, 2009**

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604**

Submitted November 4, 2008*
Decided January 7, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*

RICHARD D. CUDAHY, *Circuit Judge*

DANIEL A. MANION, *Circuit Judge*

No. 07-3612

RICHARD C. WURZINGER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

* This successive appeal has been submitted to the original panel under Operating Procedure 6(b). After examining the briefs and the record, we have concluded that oral argument is unnecessary. See Fed. R.App. P. 34(a); Cir. R. 34(f).

Appendix A

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 07 C 466
John C. Shabaz, *Judge*.

Order

Richard Wurzinger pleaded guilty to drug crimes and was sentenced to 262 months in prison. After we affirmed that sentence, 467 F.3d 649 (7th Cir.2006), and the Supreme Court denied his petition for certiorari, Wurzinger filed in the district court a document that he labeled a "motion to compel compliance" with the plea agreement by reducing the sentence on account of assistance that Wurzinger contends he has provided to the prosecutor. The district court deemed this document a motion under 28 U.S.C. § 2255 and denied it.

The "motion to compel" was properly treated as one under § 2255, because the relief Wurzinger sought (and still seeks)-either a lower sentence or an opportunity to plead over-is available only under § 2255. It is the relief a prisoner seeks, not the caption on the motion, that determines whether it comes under § 2255. See, e.g., *Melton v. United States*, 359 F.3d 855 (7th Cir.2004). The Supreme Court said much the same thing in *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct. 2641, 162 L.Ed.2d 480 (2005), when concluding that a motion nominally resting on Fed.R.Civ.P. 60(b) must be treated as one under § 2255 if it seeks release from prison or a shorter sentence.

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Although Fed.R.Crim.P. 35(b) allows a district judge to reduce a sentence on a motion by the prosecutor, there is no corresponding provision for a reduction on a defendant's motion. A defendant aggrieved by the prosecutor's decision not to make a Rule 35(b) motion must proceed under § 2255; no other statute or rule authorizes relief.

Wurzinger contends that his motion is not covered by § 2255 because the district court did not deliver the notice required by *Castro v. United States*, 540 U.S. 375, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003). This line of argument does help him; if the motion is not under § 2255 then it must be denied summarily, because only § 2255 authorizes post-conviction relief such as a lower sentence or an opportunity to vacate one's plea. But the proposition is wrong. It is based on a confusion between what a motion "really is" and what legal consequences a given motion has for later motions.

The question in *Castro* was whether a motion counts as an initial collateral attack for the purpose of the rules about second or successive petitions. The Court held that, if a motion is miscaptioned in the district court,

the lower courts' recharacterization powers are limited in the following way: The limitation applies when a court recharacterizes a *pro se* litigant's motion as a first § 2255 motion. In such circumstances the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant

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that this recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on “second or successive” motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has. If the court fails to do so, the motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law’s “second or successive” restrictions. § 2255, ¶ 8.

540 U.S. at 383, 124 S.Ct. 786. The district court did not meet this standard, because the judge did not warn Wurzinger about the limitations on second or successive motions and did not (expressly) invite him to add any other claims he wanted to present under § 2255. But all this means, according to *Castro*, is that “the motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law’s ‘second or successive’ restrictions.” It does not mean that the motion is altogether outside § 2255. Whether relief can be granted is subject to § 2255’s criteria (other than those addressed to second or successive motions). We made the same point in *Melton* and several other decisions, including *United States v. Lloyd*, 398 F.3d 978 (7th Cir. 2005), and *Wilson v. United States*, 413 F.3d 685 (7th Cir. 2005).

Because his motion is covered by § 2255, Wurzinger needs a certificate of appealability to proceed with this appeal. He is not entitled to one because he lacks a

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“substantial” constitutional question. The plea agreement provides that the prosecutor has unfettered discretion whether to file a Rule 35 motion. A prisoner could obtain relief by showing that the prosecutor acted for an unconstitutional reason, see *Wade v. United States*, 504 U.S. 181, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992), but Wurzinger has not made a prima facie case of unconstitutionality. He has not even tried. He wants to compel the prosecutor to supply a persuasive justification. A prosecutor does not bear this burden; indeed, we held in *In re United States*, 503 F.3d 638 (7th Cir.2007), that the district courts are forbidden to require prosecutors to explain their reasons for not filing Rule 35 motions unless the defendant first makes a prima facie case of unconstitutional action.

The appeal is dismissed.

**APPENDIX B — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF WISCONSIN ENTERED OCTOBER 12, 2007**

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

07-C-466-S
05-CR-52-S-01

RICHARD C. WURZINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ORDER

Petitioner Richard C. Wurzinger moves to vacate his sentence pursuant to 28 U.S.C. § 2255. This motion is fully briefed and is ready for decision.

Petitioner asks the Court to hold an evidentiary hearing. This motion will be denied as a hearing is not necessary under 28 U.S.C. § 2255. *See United States v. Kovic*, 840 F.2d 680, 682 (7th Cir. 1987).

Petitioner also moves for appointment of counsel. Pursuant to 18 U.S.C. §3006A (a)(2)(B), an attorney may be appointed for any financially eligible person seeking

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relief under 28 U.S.C. § 2255 when the Court determines that the interest of justice so requires. Based on the petitioner's ability to represent himself the Court finds that the interest of justice does not require appointment of counsel.

FACTS

On March 30, 2005 a federal grand jury in the Western District of Wisconsin returned a four-count indictment against Richard C. Wurzinger charging him in Count 1 with knowingly and intentionally conspiring to manufacture 50 grams or more of methamphetamine; in Count 2 with knowingly and intentionally possessing with intent to distribute a mixture or substance containing methamphetamine; in Count 3 with knowingly and intentionally possessing equipment, chemicals, products and materials which could be used to manufacture methamphetamine and in Count 4 with being a felon in possession of a firearm.

On July 13, 2005 petitioner pled guilty to Count 1 of the indictment pursuant to a written agreement. The plea agreement signed by petitioner included the following paragraph:

If the defendant provides substantial assistance before sentencing, the United States agrees to move the Court pursuant to 18 U.S.C. §2553(e) to impose a sentence reflecting that assistance. If the defendant provides substantial assistance after

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sentencing, the United States agrees to move the Court pursuant to Federal Rules of Criminal Procedure 35 and 18 U.S.C. §3553(e) to reduce the defendant's sentence to reflect that assistance. The decision whether to make such a request based upon substantial assistance rests entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin. The defendant acknowledges that even if the United States makes such a request, the Court is not required to reduce the defendant's sentence.

At the plea hearing the Court went through the plea agreement sentence by sentence ensuring petitioner's understanding and agreement with each paragraph including the one above. The Court also asked petitioner a number of questions to determine that the plea was, in fact, voluntary. At the plea hearing petitioner also testified that he was fully satisfied with his counsel's representation and advice given to him in the case.

On September 21, 2005 petitioner was sentenced to 262 months in prison with five years supervised release. Petitioner appealed his judgment of conviction.

On October 30, 2006 the United States Court of Appeals for the Seventh Circuit affirmed petitioner's sentence. On August 21, 2007 petitioner filed this motion under 28 U.S.C. § 2255.

*Appendix B***MEMORANDUM**

Petitioner claims that the government breached the plea agreement by failing to file a substantial assistance motion.

Three types of issues cannot be raised in a 28 U.S.C. § 2255 motion: issues that were raised on direct appeal, absent a showing of changed circumstances; non-constitutional issues that could have been raised but were not raised on direct appeal and constitutional issues that were not raised on direct appeal, unless petitioner demonstrates cause for procedural default as well as actual prejudice from the failure to appeal. *Prewitt v. United States*, 83 F.3d 813, 816 (7th Cir. 1996). Issues raised and decided on direct appeal may not be raised again in a 28 U.S.C. § 2255 motion pursuant to the "law of the case". See *Daniels v. United States*, 26 F.3d 706, 711-12 (7th Cir. 1994).

Petitioner claims that the government breached the plea agreement by failing to file a substantial assistance motion. The agreement is a part of the record. At the plea hearing the Court went through the agreement with petitioner sentence by sentence. The agreement provided that if petitioner provided substantial assistance the government would move to reduce his sentence. The agreement specifically stated as follows: "The decision whether to make such a request based upon substantial assistance rests entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin."

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By not moving to reduce petitioner's sentence the government did not breach the plea agreement because the decision whether to make the motion was within the discretion of the United States Attorney's Office. The government did not promise petitioner anything it did not provide. Accordingly, the government did not breach the plea agreement. *See United States v. Artley*, 489 F.3d 813, 824-25 (7th Cir. 2007).

Petitioner's motion under 28 U.S.C. § 2255 will be denied. Petitioner is advised that in any future proceeding in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his motion under 28 U.S.C. § 2255 must be denied. *See Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir. 1997).

ORDER

IT IS ORDERED that petitioner's motions for an evidentiary hearing and for appointment of counsel are DENIED/

IT IS FURTHER ORDERED that petitioner's motion to vacate his sentence under 28 U.S.C. § 2255 is DENIED.

Entered this 12th day of October, 2007.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge

APPENDIX C — RELEVANT STATUTES AND RULES

28 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

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(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the

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Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) **In general.**—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in

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the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.—

(A) Sentencing.—In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless—

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that—

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

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(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any

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amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.—
The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence—

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System

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and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall—

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum

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sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.—Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that—

- (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;

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(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

USSG § 5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into

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consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

Fed. R. Crim. P. 35. Correcting or Reducing a Sentence

(a) Correcting Clear Error. Within 7 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reducing a Sentence for Substantial Assistance.

(1) In General. Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

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(2) Later Motion. Upon the government's motion made more than one year after sentencing, the court may reduce a sentence if the defendant's substantial assistance involved:

(A) information not known to the defendant until one year or more after sentencing;

(B) information provided by the defendant to the government within one year of sentencing, but which did not become useful to the government until more than one year after sentencing; or

(C) information the usefulness of which could not reasonably have been anticipated by the defendant until more than one year after sentencing and which was promptly provided to the government after its usefulness was reasonably apparent to the defendant.

(3) Evaluating Substantial Assistance. In evaluating whether the defendant has provided substantial assistance, the court may consider the defendant's presentence assistance.

(4) Below Statutory Minimum. When acting under Rule 35(b), the court may reduce the sentence to a level below the minimum sentence established by statute.

(c) "Sentencing" Defined. As used in this rule, "sentencing" means the oral announcement of the sentence.

**APPENDIX D — PLEA AGREEMENT
DATED JULY 13, 2005**

U.S. Department of Justice

*Office of the
United States Attorney
Western District of Wisconsin*

July 1, 2005

Michael Lieberman
Federal Defender Services
222 W. Washington Avenue, Suite 300
Madison, WI 53703

Re: *United States v. Richard C. Wurzinger*
Case No. 05-CR-0052-5-01

Dear Attorney Lieberman:

This is the proposed plea agreement between the defendant and the United States in this case.

1. The defendant agrees to plead guilty to Count 1 of the indictment in this case. This count charges a violation of Title 21, United States Code, Section 846, which carries maximum penalties of not less than 5 nor more than 40 years in prison, a \$2,000,000 fine, at least a 4-year period of supervised release, and a \$100 special assessment. In addition to these maximum penalties, any violation of a supervised release term could lead to an additional term of imprisonment pursuant to 18 U.S.C. § 3583. The defendant agrees to pay the

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special assessment at or before sentencing. The defendant understands that the Court will enter an order pursuant to 18 U.S.C. § 3013 requiring the immediate payment of the special assessment. In an appropriate case, the defendant could be held in contempt of court and receive an additional sentence for failing to pay the special assessment as ordered by the Court.

2. The defendant acknowledges, by pleading guilty, that he is giving up the following rights: (a) to plead not guilty and to persist in that plea; (b) to a jury trial; (c) to be represented by counsel—and if necessary have the Court appoint counsel—at trial and at every other stage of the trial proceedings; (d) to confront and cross-examine adverse witnesses; (e) to be protected from compelled self-incrimination; (f) to testify and present evidence; and (g) to compel the attendance of witnesses.

3. The defendant understands that: (a) there may be evidence in this case that could be subjected to DNA testing; and (b) he could petition the district court under 18 U.S.C. § 3600 for DNA testing of evidence after conviction in this case. By his signature below, the defendant knowingly and voluntarily waives his right to post-conviction DNA testing of all evidence in this case.

4. The defendant agrees to make a full, complete and truthful statement regarding his involvement in criminal conduct, as well as the involvement of all other individuals known to the defendant. The defendant agrees to testify fully and truthfully at any trials or

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hearings. The defendant understands that this plea agreement is not conditioned upon the outcome of any trial. This agreement is, however, contingent upon complete and truthful testimony in response to questions asked by the Court, the prosecutor or lawyers for any party.

5. If the defendant provides substantial assistance before sentencing, the United States agrees to move the Court pursuant to 18 U.S.C. § 3553(e) to impose a sentence reflecting that assistance. If the defendant provides substantial assistance after sentencing, the United States agrees to move the Court pursuant to Federal Rule of Criminal Procedure 35 and 18 U.S.C. § 3553(e) to reduce the defendant's sentence to reflect that assistance. The decision whether to make such a request based upon substantial assistance rests entirely within the discretion of the United States Attorney's Office for the Western District of Wisconsin. The defendant acknowledges that even if the United States makes such a request, the Court is not required to reduce the defendant's sentence.

6. The United States further agrees that the defendant's statements made pursuant to this plea agreement will not be directly used against the defendant. However, direct use of financial disclosures made by the defendant pursuant to this plea agreement is permitted. Moreover, indirect use of all statements is permitted. This indirect use includes pursuing leads based upon information provided by the defendant, as well as the use of the statements themselves for

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impeachment and rebuttal purposes, should the defendant, at any point, be allowed to withdraw his guilty plea. These indirect uses are permitted if the defendant testifies inconsistently with the substance of these statements or otherwise presents a position inconsistent with these statements.

7. The parties agree, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), that the provisions of USSG § 1B1.8 apply to this case and that information provided by the defendant under the terms of this plea agreement will not be used to determine his sentence, except as otherwise indicated in USSG § 1B1.8(b).

8. The United States agrees that this guilty plea will completely resolve all possible federal criminal violations that have occurred in the Western District of Wisconsin provided that both of the following conditions are met: (a) the criminal conduct relates to the conduct described in the indictment; and (b) the criminal conduct was known to the United States as of the date of this plea agreement. This agreement not to prosecute is limited to those types of cases for which the United States Attorney's Office for the Western District of Wisconsin has exclusive decision-making authority. The defendant also understands that the United States will make its full file available to the Probation Office for its use in preparing the presentence report. The United States also agrees to move to dismiss the remaining counts of the indictment at the time of sentencing.

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9. The United States agrees to recommend that the Court, in computing the advisory Sentencing Guideline range, and in sentencing the defendant, give the defendant the maximum available reduction for acceptance of responsibility. This recommendation is based upon facts currently known to the United States and is contingent upon the defendant accepting responsibility according to the factors set forth in USSG § 3E1.1. The United States is free to withdraw this recommendation if the defendant has previously engaged in any conduct which is unknown to the United States and is inconsistent with acceptance of responsibility, or if he engages in any conduct between the date of this plea agreement and the sentencing hearing which is inconsistent with acceptance of responsibility. This recommendation is contingent on the defendant signing this plea letter on or before July 8, 2005.

10. The defendant agrees to complete the enclosed financial statement and return it to this office before sentencing.

11. The defendant further agrees to make a full disclosure to the United States of all assets in which he has an interest including, but not limited to, real estate, automobiles, vessels, aircrafts, cash and accounts, business enterprises, and personal property. Such disclosure should include the identity and location of each asset, the nature of the interest of the defendant in the property, the names and addresses of any lienholders against the property, the date of acquisition

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of the interest by the defendant, and an estimate of the fair market value of the asset.

12. In the event of an appeal by either party, the United States reserves the right to make arguments in support of or in opposition to the sentence imposed by the Court.

13. The defendant understands that sentencing discussions are not part of the plea agreement. The defendant should not rely upon the possibility of a particular sentence based upon any sentencing discussions between defense counsel and the United States.

14. If your understanding of our agreement conforms with mine as set out above, would you and the defendant please sign this letter and return it to me. By his signature below, the defendant acknowledges his understanding that the United States has made no promises or guarantees regarding the sentence which will be imposed. The defendant also acknowledges his understanding that the Court is not required to accept any recommendations which may be made by the United States and that the Court can impose any sentence up to and including the maximum penalties set out above.

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Very truly yours,

STEPHEN P. SINNOTT
Acting United States Attorney

By:
s/ Elizabeth Altman
ELIZABETH ALTMAN
Assistant United States Attorney

July 13, 2005
Date

s/ Michael Lieberman
MICHAEL LIEBERMAN
Attorney for the Defendant

7/7/05
Date

s/ Richard C. Wurzinger
Richard C. Wurzinger
Defendant

7/7/05
Date